UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 7

In the Matter of:

EYM KING OF MICHIGAN, LLC,
d/b/a BURGER KING,

NLRB Case No. 07-CA-118835

Respondent,

and

MICHIGAN WORKERS ORGANIZING
COMMITTEE,

Charging Party.

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BRIEF IN OPPOSITION TO RESPONDENT'S EXCEPTIONS

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I. INTRODUCTION

Respondent, the owner and operator of 22 Burger King fast food franchises, disciplined a well-known union supporter, under its loitering and solicitation rules, for discussing working conditions with her coworker, in a parked car, during non-working time and in a non-working area. That same day, the Respondent again disciplined this employee for improper placement of pickles on a sandwich. Two days later, the Respondent called a mandatory employee meeting where it announced its loitering and solicitation policy to employees and read verbatim the policy which prohibited all forms of loitering and solicitation ***anywhere*** on the Respondent's property and at ***anytime***. One month later, the Respondent threatened to fire another union supporter for discussing union activity with a coworker while working in the kitchen.

The ALJ found that the above conduct unlawfully infringed on employee Section 7 rights. The ALJ also found Respondent's loitering and solicitation (and other rules relating to misconduct) to be unlawful. Respondent excepts to these findings. For reasons cited below, the ALJ's findings of fact and conclusions of law were correct and thus Respondent's exceptions must be denied.

II. MATERIAL FACTS PRESENTED

A. The Parties

Since June 2013, EYM King of Michigan, LLC (hereinafter "Respondent" or "Employer") has been the corporate owner and operator of 22 Burger King franchise restaurants in the City of Detroit and its adjacent suburbs. One of the 22 Burger King franchises is located in Ferndale, Michigan.

The Michigan Worker's Organizing Committee (hereafter "Union") is a labor organization whose focus is organizing employees in the fast food industry throughout the State of Michigan. It is one of many unions across the nation that is attempting to improve the working conditions for fast

food workers through coordinated campaigns. The Union's campaign in Michigan is known as D15. (Tr. 61) The D15 campaign seeks a $15 per hour wage for fast food workers. (Tr. 61) One way the D15 campaign has attempted to achieve this goal is by organizing one-day strikes at various fast food restaurants.

On May 10, 2013, July 31, 2013 and August 29, 2013, employees at Detroit-area McDonalds, Burger King, Popeyes, Taco Bell and other fast food restaurants struck in support of the D15 campaign. (Tr. 61, 67, 70) Over 400 fast food workers participated in the May 10, 2013 strike and protested at over 60 fast food restaurants throughout the metro Detroit area. (Tr. 113) The strikes involved picketing, chanting, marching and other acts of protest on public property surrounding the fast food restaurants.[1] Two of Respondent's employees, Claudette Wilson and Romell Frazier, participated in these strikes and were vocal supporters of the D15 campaign.

B. September 19, 2013 Concerted Protected Activity.

On September 19, 2013, while off-duty, Wilson drove her car to Respondent's Ferndale store and parked in the parking lot. (Tr. 80) Soon after her arrival, Wilson's co-worker Jalissa Johnson completed her shift and was leaving the restaurant. (Tr. 82) Wilson asked if she could speak with Johnson and the two sat in Wilson's car. Wilson spoke to Johnson about claims that the Employer was engaging in "wage theft" or failing to pay employees for time spent working. (Tr. 83) Wilson had a written survey with her that she asked Johnson to complete. While Johnson was completing the survey, General Manager Charlene Pack came up to the Wilson's car and asked Wilson and Johnson "what are you all doing". (Tr. 540) Pack saw Johnson filling out the survey (*Id.*) Pack then told them "you can't be out here soliciting around the building." (*Id.*) Johnson immediately got

[1] No strike activity occurred in the parking lots, inside the restaurants or in the drive-through lanes at any of the fast food facilities. (Tr. 114, 205-206)

out of the car and left the Employer's premises. (Tr. 83). Wilson told Pack that she was not breaking any rules and that she did not intend to stop. (Tr. 83, 541) Pack testified that Wilson "didn't obey what I had told her." (Tr. 541)

C. September 20, 2013 Discipline of Wilson.

On the following day, September 20, 2013, Pack gave Wilson a disciplinary notice and told her that she was required to sign it. (GC Ex. 5, Tr.) Wilson asked Pack why she was being disciplined, and Pack told her that it was for her conduct the day before. (Tr. 86) Pack testified that she issued the discipline because

> . . . it was the striking, and everything was getting out of hand, and it was beginning to be too much because like I say, everyday that they worked, they talked about it, and I had told my boss about, and you know, he told me to write it up and document it about the soliciting and loitering and to make sure that [Wilson] knows it's not allowed." (Tr. 541)

Although she disagreed with the discipline, Wilson signed the notice which read:

> "On Friday September 20, 2013 Claudette Wilson and I talked about her loitering and soliciting in and around the Burger King Building. This is not acceptable and it must not happen again." (Tr. 86)

The discipline was labeled a "verbal warning" and cited violations of "conduct," "breach of company policy" and "failure to follow instructions." (*Id.*)

After receiving the discipline, Wilson went back to work to finish her shift. That day she was assigned to work on "the board," where employees cook and assemble sandwiches. (Tr. 88) During the lunch rush, Wilson was working quickly to complete the increased volume of orders when she observed a shift manager watching her make sandwiches. Wilson also observed this manager go to Pack's office and speak with her. Immediately after, Pack questioned Wilson why she was "throwing pickles on sandwiches." (Tr. 88) Wilson denied doing anything improper in making sandwiches. (*Id.*) Pack told Wilson that she was not going to allow her to make "sloppy

sandwiches," and sent her home approximately three hours before the end of her scheduled shift. (Tr. 89, 91)[2] Pack denied formally disciplining Wilson for improper placement of pickles, but did not deny scolding her for "throwing pickles on sandwiches." Respondent's policy is for employees to place four pickles on each sandwich in a perfect square. (Tr. 529) No customer complained about the pickles on their sandwich on that day. (Tr. 89)

D. September 21, 2013 Crew Meeting.

On September 21, 2013, the Employer held a meeting for all employees of the Ferndale Burger King. The meeting was held in the restaurant's lobby and approximately 20 employees were in attendance, including Wilson and Frazier. (Tr. 163, 210) The Employer did not close the restaurant during the meeting and customers were present inside the lobby throughout the duration of the meeting. (*Id.*)

The meeting was lead by managers Charlene Pack and Edward Eberhart (known by employees as "Mr. E"). During the meeting, Pack introduced the Employment Policies and Procedures Handbook. (GC Ex. 2, Tr. 546)) Pack read verbatim to employees the Solicitation and Loitering Policy to the employees contained in the handbook. (Tr. 546)

E. Employer's Threats to Discharge Frazier.

In October 2013, Frazier was discussing the D15 campaign with co-workers Eddie George, Tajuan McGee and Donnika Healy, while they worked on the sandwich board. (Tr. 196, 230) Shift manager Tajai Howard was also nearby, bagging the sandwiches (Tr. 196). Frazier was talking to the employees about their interest in the D15 campaign. (Tr. 231) During this conversation, he

[2] The Employer produced a number of employee schedules in response to subpoenas by the GC and Union, however suspiciously omitted the schedule for the week that included September 20, 2013. Employer Exhibit 87 shows that Wilson clocked out at 3:40 pm on that day, but does not include any information about when she was scheduled to work that day.

observed Howard walk over to Pack's office. Immediately thereafter, Pack approached Frazier and the others and said, "if you're talking about striking again, you're going to be picking up your last paycheck." (Tr. 196-197)

F. The Employer's Handbook Policies.

On June 1, 2013, the Employer implemented its Employment Policies and Procedures Handbook. (GC Ex. 2) Among the various policies contained in this handbook are the following:

1. Loitering and Soliciting

Loitering and soliciting either inside or outside on Company premises is strictly prohibited. You should arrive some minutes before your entry hour and leave as soon as you finish your shift. Employees are not authorized to remain in the restaurant after work. If you are not working or eating in a store, your conduct may be construed as loitering. If you are off-duty and return to the store to speak with employees who are working, your conduct may be considered loitering. Former employees who return to the store to speak with employees who are working are loitering. This policy is designed to prevent the disruption of company business due to unnecessary interaction with non-working employees or non-employees. Employees who violate this policy may be subject to discipline, up to and including termination.

2. Professional Conduct - Misconduct

EYM King of Michigan, LLC is committed to providing a work environment that encourages mutual respect and professionalism among employees. Every employee has the right to work without disorderly or undue interference from others. You are expected to be responsible and reasonable, conduct yourself in a professional, business-like manner, which includes being honest, ethical and safe. We expect your behavior to be professional in the workplace and whenever your are representing the company. Listed below are some examples of what we expect when we say "professional behavior." The following is a partial list of acts that are considered misconduct and may result in disciplinary action up to and including termination:

- Failure to treat co-workers, customers, suppliers and visitors with courtesy and respect
- Falsification, alteration, misrepresentation, or removal of company documents and/or records, or documents required by law
- Providing false information to the Company regarding job applications, injuries, accidents or incidents in the workplace
- Verbal or physical altercations, intimidating behavior, threats of violence or any sort of unprofessional conduct toward any employee, customer, or others who you encounter in connection with your employment
- Using foul or abusive language or profanity of any sort
- Sending, receiving or posting information that could be considered defamatory or disparaging to the Company

- Making false, fraudulent or malicious statements about the Company, team members, customers, suppliers or visitors
- Providing information or trade secrets regarding the Company or Burger King to any media representative, reporter or investigator with Company approval
- Any off-duty offense which would reflect negatively on the Company

On March 13, 2014, in response to the unfair labor practice alleged in this case, the Employer drafted changes to the three policies referenced above. The revised policies state:

(a) Loitering and Soliciting

Loitering and soliciting either inside or outside on Company premises is strictly prohibited. You should arrive some minutes before your entry hour and, unless dining, leave the restaurant as soon as you finish your shift. Except as customers, employees are not authorized to remain in the restaurant after work. If you are not working or eating in a restaurant, your conduct may be construed as loitering. This policy is designed to prevent interference with working employees' ability to perform their jobs, facilitate customer ingress, egress, and facility access, prevent the disruption of Company business, and ensure employee, customer and public safety while on Company premises, both inside the facility and in the parking and drive-through areas of the restaurant.

(b) Professional Conduct - Misconduct

EYM King of Michigan, LLC is committed to providing a work environment that encourages mutual respect and professionalism among employees. Every employee has the right to work without disorderly or undue interference from others. You are expected to be responsible and reasonable, conduct yourself in a professional, business-like manner, which includes being honest, ethical and safe. We expect your behavior to be professional in the workplace and whenever your are representing the company. Listed below are some examples of what we expect when we say "professional behavior." The following is a partial list of acts that are considered misconduct and may result in disciplinary action up to and including termination:

- Failure to treat co-workers, customers, suppliers and visitors with courtesy and respect
- Falsification, alteration, misrepresentation, or removal of company documents and/or records, or documents required by law
- Providing false information to the Company regarding job applications, injuries, accidents or incidents in the workplace
- Verbal or physical altercations, intimidating behavior, threats of violence or any sort of unprofessional conduct toward any employee, customer, or others who you encounter in connection with your employment
- Using foul or abusive language or profanity of any sort

G. Solicitation of Avon Products at Employer's Franchise.

During his employment with EYM King, Michael Ross worked as a crew member performing general maintenance work. (Tr. 461) He also assisted his fiancé in expanding her sales clientele as a representative of Avon. He did so by distributing packets of catalogues and brochures containing products for customers to order. Ross was a student and would primarily distribute the Avon materials to other students at school, but he would often bring the Avon booklets to work at Burger King. (Tr. 462) When word got out among his Burger King coworkers that he had information about Avon products, many employees -- including managers Shavonna Jones and general manager Charlene Pack -- asked him for a booklet and he gave them one in the lobby of the Burger King during working hours. (Tr. 468) Ross testified:

> Q. So you were solicited by Ms. Pack for the Avon material at the Ferndale facility, correct?
> A. Correct.

(Tr. 472)

On September 30, 2013 Romell Frazier picked up one of these Avon booklets in the crew room of the Burger King, this booklet was admitted as GC Exhibit #11.[3] (Tr. 249) That same day he observed at least three other Avon booklets circulating throughout the restaurant. (Tr. 253) Also on this day, Frazier observed Pack reading through the materials inside the Avon booklet during working hours. (*Id.*)

Pack admitted that she knew that Ross was selling Avon products at the restaurant and that she placed an order with Ross' fiancé. (Tr. 536) Pack also admitted that she received the order at the restaurant during working hours. (Tr. 537) Pack further testified that she learned that Michael

[3] Ross denies that he ever gave Frazier this booklet, however admits that GC Exhibit #11 is one of the booklets that he distributed at the Burger King in an attempt to promote his fiance's Avon sales. (Tr. 471)

was soliciting Avon products at the restaurant when he saw him with a packet of catalogues in his hand during his break. (Tr. 533-34) Ross was never disciplined for solicitation.

III. STATEMENT OF THE CASE AND ALJ'S FINDINGS

On May 27, 2014, the NLRB Regional Director issued Complaint in this matter against EYM King of Michigan LLC. (GC Ex. 1) On July 28 and 29, 2014, a hearing was conducted before Administrative Law Judge Arthur J. Amchan. On September 29, 2014, ALJ Amchan issued his decision and recommended order and made the following findings of fact and conclusions of law:

- Respondent's loitering and solicitation policies (original and March 12, 2014 revisions) violate Section 8(a)(1) because the policies bar off-duty employees and all Section 7 solicitation and distribution from the Employer's premises, including its parking lot. (Decision, p. 9-11)

- Respondent's misconduct policy (both original and revised) violated Section 8(a)(1) by prohibiting (1) "misrepresentation . . . of company documents and/or records"' (2) "providing false information to the company regarding job applications, injuries, accidents or incidents in the workplace; (3) "unprofessional conduct toward any employee"; and "using foul or abusive language"; (4) "sending, receiving or posting information that could be considered defamatory or disparaging to the company"; and (5) "any off duty offense which would reflect negatively on the company." (Decision, p. 11-13)

- Respondent violated Section 8(a)(1) by enforcing the loitering and solicitation policy when it (1) told employee Claudette Wilson she could not solicit other employees in the parking lot on September 19, 2013; (2) disciplined Wilson on September 20, 2013 for soliciting an employee in Respondent's parking lot; (3) suspending Wilson on September 20, 2013 for improper placement of pickles on sandwiches; (4) reading the loitering and solicitation policy to employees during a meeting on September 21, 2013; and (5) threatening to discharge employee Romell Frazier for engaging in protected concerted activity in October 2013. (Decision, p. 4, 13-14)

- Respondent violated Section 8(a)(3) and (1) by issuing disciplining warnings to Wilson on September 20, 2013 and suspending her that day. (Decision, p.14)

On October 27, 2014, Respondent filed exceptions to the ALJ's decision arguing that the ALJ erred in making the above findings. On November 10, 2014, the NLRB extended the time for Charging Party to file its response to Respondent's Exceptions to November 20, 2014.

IV. ISSUES PRESENTED

Respondent raises the following issues in its Exceptions to the ALJ's Decision:

1. Did the ALJ erroneously find that the Respondent, as a retail fast food restaurant, unlawfully interfered with employees' Section 7 rights by banning solicitation and loitering in all of its customer and sales areas, including the exterior drive-thru and parking lots? (Exceptions 3, 5, 6, 13-17)

2. Did the ALJ err in finding that Respondent was not justified by special circumstances in maintaining its overly broad loitering and solicitation policy? (Exceptions 4, 5, 6, 13-17)

3. Did the ALJ err in finding that Respondent's misconduct policy infringed upon Section 7 rights? (Exceptions 8-12, 16, 17)

4. Did the ALJ err in finding that Respondent's enforcement of its loitering and solicitation policy as applied to employee Wilson and its reading of said policy during a team meeting violate the Act? (Exceptions 1, 2, 16, 17)

5. Did the ALJ err in finding that Respondent unlawfully threatened employee Frazier with discharge? (Exceptions 1, 2, 16, 17)

V. ARGUMENT

A. The ALJ Correctly Found That Respondent's Loitering and Solicitation Policy Was an Overly Broad Infringement upon Section 7 Rights.

Respondent argues that the ALJ erred in not applying the applicable case law as it relates to "retail restaurant businesses" and that under this law, Respondent's loitering and solicitation policy is lawful because every square inch of Respondent's premises (both interior and exterior) are "selling areas." The ALJ properly referenced and analyzed a long line of cases which directly address rules prohibiting off-duty employee access to an employer's premises.[4] The ALJ applied the well-established principle that an employer cannot lawfully prohibit employee solicitation on company

[4] The ALJ cites *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945); *Jerry's Boston Hotel,* 356 NLRB No. 114 (2011); *Durham School Services,* 360 NLRB No. 85 (April 25, 2004); *St. John's Health Center,* 357 NLRB No. 170 (2011); *Tri-County Medical Center,* 222 NLRB 1089 (1976).

premises during non-working time in non-working areas, absent special circumstances. See *Republic Aviation v. NLRB*, 324 U.S. 793 (1945); *Stoddard-Quirk Manufacturing Co.,* 138 NLRB 615 (1962). The fact that Respondent's stores were considered retail facilities or restaurants does not require analysis of law beyond these principles. Respondent's loitering and solicitation policy is presumptively unlawful because it is not limited to non-working time or non-working areas, but instead bans solicitation ***anywhere*** on Respondent's premises and at ***all times.*** As this rule is an overly broad infringement on Section 7 rights, the ALJ properly found a violation of Section 8(a)(1).

Respondent argues that under *Tri-County Medical Center,* 222 NLRB 1089 (1976), its loitering and solicitation policy is lawful because every inch of property on which its Burger King franchises sit are "working areas" or "selling areas" as defined by law. Here, however, the ALJ properly found that, as a matter of law, the parking lots at each of Respondent's facilities were not "working areas" because any work performed in these areas (i.e., maintenance, trash removal or conducting "travel paths") is incidental to Respondent's primary business of serving food to customers via in-store purchases or through designated drive-thru lanes. Respondent presented no evidence that use of its parking lot at any of its 22 Burger King franchises interfered with Respondent's ability to serve fast food to customers. Clearly, the parking lots of Respondent's facilities are not "working areas" under law to justify its overly broad policy.

B. Respondent's Loitering and Solicitation Policy is Not Justified by Special Circumstances.

Respondent argues that under the *Tri-County* standard, it is justified to maintain its loitering and solicitation policy because of special business interests at its restaurants that outweigh the risk of infringement upon Section 7 rights. For the following reasons, Respondent's cited business justifications fail:

1. Maintenance of its policy for the purpose of protecting Respondent's production and product is wholly unsupported by the record.

Respondent argues that because its product is fast food and the means of producing this product is the use of drive-thru and limited customer parking spaces, it is justified in maintaining its loitering and solicitation policy, even if found to be overly broad. Respondent relies entirely upon speculation that disruption of timely service will result from permitting protected concerted activity in the parking lot and drive-thru areas of its restaurants. However, Respondent presents no evidence that loitering or solicitation in and around the exterior of its property (including the parking lot and drive-thru areas) has, in fact, caused a disruption in business or prevented it from achieving its goal of servicing customers in a timely manner. Here, Respondent enforced this policy, not as a result of loitering and solicitation in and around the drive-thru area, but as a result of two employees sitting in a private vehicle during non-working hours, parked in an area that neither impeded drive-thru traffic or caused congestion as to prevent customers from accessing the store to make purchases. For these reasons, Respondent's production and product do not justify the maintenance of its loitering and solicitation policy as applied to the exterior areas of its restaurants.

2. Safety considerations stemming from crime and vehicle/pedestrian accidents do not constitute special circumstances to justify Respondent's policy.

The ALJ correctly found that "there is no material difference between the security concerns in Detroit and those in every inner city in this country. (Decision p. 9, lines 36-37) High rates of crime in surrounding neighborhoods, and the risks of vehicular accidents on an employer's property are not unique or special circumstances to the fast food industry or to any of the 22 Burger King stores that Respondent operates.

Contrary to Respondent's contention that safety concerns necessitate an overly broad loitering and solicitation policy, Respondent admitted that loitering and solicitation on his premises

has never contributed to safety issues due to crime, traffic or any other reason. (Tr. 440) Finally, Respondent's contention that public safety is the intended purpose of this policy, runs counter to the explicitly stated purpose of the policy "to prevent the disruption of company business due to unnecessary interaction with non-working employees or non-employees." (GC Ex. 2) Respondent's March 2014 revisions of this policy are nothing more than an after-the-fact attempt at justifying its overly broad policy in response to the Charging Party's unfair labor practice charge, not because of any legitimate concerns for public safety. During the hearing, Respondent admitted to this. (Tr. 361) For these reasons, Respondent's claim that safety considerations constitute "special circumstances" under law to justify its overly broad policy was properly rejected by the ALJ.

3. Compliance with local ordinances, workers compensation statutes and avoidance of civil liability are not special circumstances.

The ALJ properly found that any concerns about liability under local ordinances, statutes or tort law would not pose any significant conflict between Respondent's obligation to honor employees' Section 7 rights under the principles of federal labor law preemption governed by *San Diego Building Trades Council v. Garman,* 359 U.S. 236 (1959) (Decision p. 10, fn. 8) Again, Respondent presents no evidence that any of its restaurants were held liable, or were exposed in any way to liability, under local ordinances, statutes or negligence claims as a result of its failure to strictly enforce loitering and solicitation on its premises. Respondent's contention that its loitering and solicitation policy somehow results in a less dangerous premises and therefore minimizes exposure to civil and criminal liability is specious at best and must be rejected.

For these reasons, the ALJ properly rejected Respondent's claim that special circumstances justified maintenance of its loitering and solicitation policy. Respondents's exception to this finding must be dismissed.

C. The ALJ Correctly Found That Respondent's Discipline of Employee Claudette Wilson and its Reading of the Loitering and Solicitation Policy During a Team Meeting Were Unlawful.

The ALJ found that Respondent's reading of the loitering and solicitation policy at a mandatory employee meeting was an independent violation of Section 8(a)(1). During the hearing, Respondent's manager, Charlene Pack, did not refute that she read from this policy. Respondent's conduct prohibited employees from discussing their terms and conditions of employment with any non-employee, including during non-working time and in non-working areas, and thus unlawfully infringed upon employees' Section 7 rights.

Moreover, the ALJ properly found Respondent's discipline of Wilson under the loitering and solicitation policy on September 19 and 20, 2013 to be unlawful. Respondent does not except to any findings of fact relating to the events giving rise to these disciplines, but instead argues that as a matter of law, the loitering and solicitation policy is not unlawful and therefore discipline under the policy does not amount to a violation of the Act. For the reasons stated above, the ALJ correctly found that Respondent's loitering and solicitation policy is an overly broad infringement upon Section 7 rights and presumptively unlawful under the Act.

The ALJ correctly relied upon the standard announced in *Wright Line*, 251 NLRB 1083 (1980) in finding a violation of Sections 8(a)(3) and (1) of the Act when Respondent suspended Wilson on September 20, 2013 for improper placement of pickles on a sandwich. Specifically, the ALJ found that the GC established a *prima facie* showing of discrimination because it was clear from the discipline issued to Wilson on the days prior that Respondent was motivated by union animus. Again, Respondent does not except to any findings of fact surrounding the September 20, 2013 discipline, but instead argues that the ALJ erred in finding a *prima facie* case under *Wright Line* because the discipline the ALJ relied upon in finding union animus was not, as a matter of law,

unlawful. As stated above, Wilson's discipline on September 19 and 20 under the loitering and solicitation policy was issued in direct response to protected concerted activity and was unlawful. The ALJ properly analyzed Respondent's unlawful conduct, which occurred less than 24 hours prior to her suspension, in finding union animus.

Moreover, although the ALJ made no such findings, the record in this matter clearly demonstrates union animus under *Wright Line* from Respondent's disparate treatment of Wilson. Respondent enforced its loitering and solicitation policy against only one employee -- Claudette Wilson. Although Charlene Pack observed both Wilson and Jalissa Johnson purportedly loitering in the parking lot, Respondent issued discipline only to Wilson. Johnson, unlike Wilson, was not a known advocate for the Union. Finally, Respondent enforced the loitering and solicitation policy against Wilson's union activity, while permitting the solicitation of Avon products at Respondent's Ferndale, Michigan store. Respondent's disparate enforcement of its loitering and solicitation policy is further evidence of union animus in its discipline of Wilson.

D. The ALJ Did Not Err in Finding That Portions of Respondent's Misconduct Policy Unlawfully Infringed Upon Section 7 Rights.

Respondent excepts to the ALJ's finding that certain portions of its misconduct policy are unlawful on the basis that the ALJ "completely ignored" the phrase contained in the opening paragraph of the policy "[w]e expect your behavior to be professional ***in the workplace*** and whenever you are ***representing the company***." (R. Ex. 36, 56; R. Brief pp. 30-31) [emphasis added]

However, this single sentence which precedes Respondent's description of misconduct does not limit the policy's application to non-working or off-duty time. This statement merely expresses Respondent's desire for employees to engage in "professional" behavior while at Respondent's workplace. Under well-established law, cited in previous sections here, employees can lawfully engage in protected concerted activities while on an employer's premises during non-working time

and in non-working areas. On its face, Respondent's policy does not limit "professional behavior" to non-working time or non-working areas.

Moreover, nowhere in this policy does it define "workplace." Clearly, "workplace" under this policy is an ambiguous term for which employees could reasonably construe to include non-working areas at Respondent's stores, such as break rooms and the parking lot. See *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004).

Finally, Respondent's rule creates an ambiguity as to the meaning of "representing the company." An employee could reasonably interpret this phrase to prohibit Section 7 activity while on Respondent's premises, in uniform, and during non-working time -- such as lunch breaks. For these reasons, Respondent's exception fails to establish any misapplication of law or fact by the ALJ.

For the following reasons, Respondent's exceptions to the ALJ's finding that specific portions of the misconduct policy were unlawful must be rejected.

1. **"Making false, fraudulent or malicious statements about the Company, team members, customers, suppliers or visitors"**

2. **"Providing false information to the Company regarding job applications, injuries, accidents or incidents in the workplace."**

The ALJ found this rule unlawful because it exposes employees to discipline for making merely false statements. The ALJ relied upon *American Cast Iron Pipe Co.*, 234 NLRB 1126, 1131 (1978) which held that rules banning employees from making false statements, instead of maliciously false statements, unlawfully infringe upon Section 7 rights. ("Punishing employees for distributing merely 'false' statements fails to define the area of permissible conduct in a manner clear to employees and thus causes employees to refrain from engaging in protected concerted activities.") *Id.* The ALJ correctly found that such a rule could be reasonably interpreted to prohibit the

discussion of wages, hours and working conditions "unless [the employees] are absolutely sure they have their facts straight." (Decision, p. 12 , lines. 5-6)

Respondent excepts to this finding and argues that the ALJ failed to read this rule as limited only to false statements made on job applications and regarding injuries and accidents in the workplace. The rule, however, also bans employees from providing false information about ***incidents in the workplace***, without any definition as to the meaning of "incidents" or any limitation as to its application. This rule could be reasonably interpreted as banning employees from providing false information about any and all events that occurred at Respondent's restaurants, including those relating to employee terms and conditions of employment.

3. "Using foul or abusive language or profanity of any sort."

4. "Verbal or physical altercations, intimidating behavior, threats of violence or any sort of unprofessional conduct toward any employee, customer, or others who you encounter in connection with your employment."

The ALJ found that the unlimited scope of these rules as to the meaning of "abusive" and "unprofessional" could reasonably be read to prohibit Section 7 activity. (Decision, p. 12 , lines 14-17, citing *Flamingo Hilton-Laughlin*, 330 NLRB 287, 295 (1999) (rules that prohibit the use of loud, abusive or foul language, and disorderly conduct on the employer's premises were presumptively unlawful)). The Respondent argues that this rule limits unprofessional conduct solely to conduct at the workplace because such conduct must be directed toward "others who you encounter in connection with your employment." (Resp. Brief, p. 36) This rule, however, prohibits conduct toward ***any person*** that an employee encounters. The vague and ambiguous term "in connection with your employment," could reasonably be interpreted as applying to encounters with union organizers during non-working time and in non-working areas, such as during the work protests that occurred at the Respondent's restaurant. Surely, a reasonable employee could construe

"unprofessional" conduct to include picketing, chanting and public protests directed toward Respondents' managers. It would be just as reasonable for an employee to interpret "encounters in connection with your employment," to include participating in union-lead protests over working conditions. For these reasons, the ALJ properly found that this rule violated Section 8(a)(1) of the Act.

5. "Any off-duty offense which would reflect negatively on the Company."

The ALJ found that this rule could reasonably be read to cover protected activity relating to the D15 campaign, and therefore was an overly broad restriction of Section 7 rights. (Decision, p. 13 , lines. 1-4). In *Hills and Dales General Hospital* 360 NLRB No. 70 (2014) the Board held that a prohibition on "negative comments" about coworkers and generally banning "negativity" was similarly an overly broad infringement of Section 7 rights. The Board has also held that rules that prohibit employee communication that has a tendency to "damage the Company, defame any individual or damage a person's reputation" are unlawful under the Act. *Costco Wholesale Corporation*, 358 NLRB No. 106 (September 7, 2012) Here, this rule does not define in any way what Respondent considers to be conduct that "would reflect negatively on the Company." This rule, in effect, would ban communications about any union campaign during non-working time. The ALJ correctly found this rule as violative of Section 8(a)(1).

6. "Sending, receiving or posting information that could be considered defamatory or disparaging to the Company."

7. "Providing information or trade secrets to any media representative or investigator without company approval."

The ALJ found that this rule constitutes an overly broad prohibition on employee communication that could reasonably be interpreted as prohibiting discussions about wages, hours and working conditions. (Decision, p. 12, lines. 19-24) Respondent excepts to this finding based

solely on its claim that the phrase "[w]e expect your behavior to be professional in the workplace and whenever you are representing the company," limits the rules application to conduct that occurs while employees are on-duty. (Resp. Brief, p. 39) For the reasons stated earlier, this argument if fatally flawed.

The Board has held that banning "disparaging or defamatory comments," without clearly defining the scope of such prohibitions is an overly broad infringement upon Section 7 rights. See *Dish Network Corporation*, 359 No. 108 (April 30, 2013). See also *Great Lakes Steel*, 236 NLRB 1033 (1978) (rule banning literature which was "libelous, defamatory, scurrilous, abusive or insulting" is unlawful). A reasonable interpretation of his rule would require an employee to seek prior approval from Respondent to disclose any form of "information" that it acquires during employment, including information relating to terms and conditions of employment. The Board has held that an employer's absolute discretion over the application of a rule is unlawful when employees must seek permission before engaging in protected activity. *TeleTech Holdings, Inc*. 333 NLRB 402 (2001).

The Board has also held that prohibiting employees from communicating with law enforcement agents could be reasonably construed by employees as requiring employer permission to participate in a NLRB investigation and is thus unlawful. See *DirectTV Holdings*, LLC, 359 NLRB No. 54 (2013). Like the above cases, this rule is an overly broad ban on activity that serves to chill the exercise of Section 7 rights and is thus unlawful.

E. The ALJ Correctly Found That Respondent Unlawfully Threatened Employee Romell Frazier With Discharge For Engaging in Protected Activity.

Respondent excepts to the ALJ's finding that Respondent violated Section 8(a)(1) when general manager Pack threatened to discharge Romell Frazier for discussing union activities while at work. Respondent contends that Frazier's conduct amounted to solicitation and that under *Double*

Eagle Hotel & Casino, 414 F.3d 1249 (10th Cir. 2005), it was permitted to ban such conduct because Respondent operates retail and/or restaurant establishment. (Resp. Brief, pp. 41-43) More specifically, Respondent argues that, as a matter of law, prohibiting union solicitation in customer and selling areas of its restaurants is not unlawful because of the disruptive tendency of such solicitation. For the following reasons, Respondent's exception fails:

First, the ALJ applied proper legal standard to this Complaint allegation. The ALJ cited *Jensen Enterprises*, Inc. 339 NLRB 877, 878 (2003) and *Sam's Club*, 349 NLRB 1007, 1009-10 (2007) for the proposition that employers cannot lawfully prohibit discussion of union activity during working hours while permitting employees to discuss other subjects unrelated to work. The record is clear that Respondent permitted employees to discuss non-work related topics while working. (Tr. 74-75, 125-126, 193-195, 208-209) In fact, the general manager of the store, herself, regularly discussed non-work related subjects with employees while they worked. (Tr. 74-75, 194, 208-209) Under applicable law, the ALJ correctly found a violation.

Second, even under the no-solicitation analysis, Frazier was threatened while discussing union activity, not in a selling area, but in the kitchen of the restaurant. Respondent presented no evidence that customers are permitted access to its kitchen areas. Common knowledge of fast food restaurants, however, suggest that customers have no access to or frequent the kitchen areas of the restaurants.

Third, there is no record evidence that Frazier's conduct posed any risk of disruption to Respondent's production. To the contrary, a brief discussion between employees about union activities unlikely caused any disruption in the production of food or had any impact in customer satisfaction to give merit to Respondent's exception.

Finally, even if Frazier was engaged in union solicitation, Respondent targeted Frazier in a disparate manner under this policy. As stated above, Respondent openly permitted employees to solicit Avon products while at work. Pack, herself, purchased Avon items. Only Frazier, a known and vocal union activist, was targeted under this no-solicitation rule. As a matter of law, an otherwise valid no-solicitation rule can violate the Act if the rule is applied in a disparate manner against union solicitation. *NLRB v. St. Francis Healthcare Centre*, 212 F.3d 945, 961 (6th Cir. 2000), *enf'd in relevant part*, 325 NLRB 905 (1998). See also *Reno Hilton Resorts*, 320 NLRB 197, 208 (1995) (prohibition of only pro-union solicitation under otherwise valid no-solicitation policy found to violate the Act).

The ALJ correctly found that Respondent unlawfully threatened Frazier for discussing union activity at work.

VI. CONCLUSION

For the above stated reasons, Respondent's exceptions are wholly lacking in merit and should be dismissed. The Charging Party respectfully requests that the NLRB affirm the ALJ's Decision and Recommended Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2014, the foregoing paper was filed with the NLRB using the E-filing system and served upon:

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